MOTION FILED
FEB 2 8 2002

(4)

No. 01-958

IN THE

Supreme Court of the United States

CHRIS WOODALL AND COLUMBIA RIVER GORGE COMMISSION,
Petitioners,

v.

SKAMANIA COUNTY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE DELAWARE RIVER PORT AUTHORITY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

The Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") respectfully moves for leave to file the attached brief *amicus curiae* brief in this case. The consent of the attorneys for each of the Petitioners was obtained and filed with the Clerk of the Court. The consent of the attorney for Respondent was requested but refused.

The interest of the DRPA in this case arises from the fact that it, like Petitioner CRGC, is a bi-state public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey, created pursuant to the Compact Clause of Article I of the United States Constitution, art. I, § 10, cl. 3. The Washington Court of Appeals' decision imposed the common law of Washington on a bi-state entity without authorization from Washington's legislature and in the face of conflicting Oregon law. The Washington Court of Appeals' decision added to a growing conflict concerning the appropriate legal standard for application of a single state's law to a bi-state entity between federal and most state courts, on the one hand, and certain state courts, on the other hand — specifically, the state courts of Washington and New Jersey.

Recently, the DRPA has been faced with New Jersey state courts issuing decisions based solely on New Jersey statutory or common law in derogation of its bi-state compact. It is likely that the legal issue in this case will continue to recur until this Court sets forth a clear, uniform and workable federal legal standard concerning how and when courts may impose a single state's law on a bi-state compact entity.

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TABLE OF CONTENTS

	Page
THE DRPA'S INTEREST AS *AMICUS CURIAE* . . .	1
ARGUMENT	3
I. The Issue Presented Potentially Affects Nearly 200 Bi-State Compact Entities Throughout The Nation And Is Important	3
II. This Court Should Grant Review To Establish An Appropriate Uniform Federal Legal Standard For Analyzing The Important Federal Question Of When, If Ever, A Single State's Laws May Be Imposed On A Bi-State Entity.	5
A. All Federal Courts And Some State Courts Have A Standard Requiring An "Express Statement" Of Intent And Legislative "Concurrence" Before Imposing One Creator State's Law On Bi-State Entities	7
B. Washington And New Jersey State Courts Have Formulated And Applied A Different Test For Analyzing The Imposition Of State Law On Bi-State Entities	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: **Page**

Andrew v. King Co., 21 Wash. App. 566, 572, 586 P.2d 509, 513-14 (1978), *review denied*, 91 Wash.2d 1023 (1979) 6

Ballinger v. Delaware River Port. Auth., 311 N.J. Super. 317, 709 A.2d 11336 (App. Div. 1998) . . . 10

Baron v. Port Auth. of New York and New Jersey, 968 F. Supp. 924, 929 (S.D.N.Y. 1997). 8

Bell v. Bell, 83 N.J. 417, 310 A.2d 829 (1980) 10

Bunk v. Port Authority of New York and New Jersey, 144 N.J. 176, 676 A.2d 118 (1996) 10

C.T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 409-10 (D. Md. 1976) 5, 7

Cuyler v. Adams, 449 U.S. 433, 438 (1981) 3

Delaware River Port Auth. v. Carello, 43 Del. Ch. 213, 222 A.2d 794 (1966) 6

Delaware River Port Auth. v. Comm. of Pennsylvania, 137 Pa. Commw. 170, 172-73, 585 A.2d 587, 588 (1991) 6

Delaware River Port Auth. v. Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP"), 135 F. Supp.2d 596 (E.D. Pa. 2001), *appeal docketed*, No. 01-1866 (3d Cir. April 10, 2001) 5

Dezaio v. Port Auth. of New York and New Jersey, 205 F.3d 62 (2d Cir.), *cert. denied*, 531 U.S. 818 3(2000). 3, 5, 8

Eastern Paralyzed Veterans Assn. v. City of Camden, 111 N.J. 389, 545 A.2d 127 (1989) 10

TABLE OF AUTHORITIES

Page

Fraternal Order of Police, Penn-Jersey Lodge 30 v. Delaware River Port Auth., 323 N.J. Super. 444, 733 A.2d 545 (App. Div. 1999), *certif. denied.* 162 N.J. 663, 745 A. 2d 1213 (1999), *cert denied,* 530 U.S. 1275 (2000) 3, 11

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994) 5

Int'l Union of Op. Eng'rs, Local 68 v. Delaware River and Bay Auth., 143 N.J. 328, 670 A.2d 1068 (1996), *cert. denied,* 522 U.S. 861 (1997) 3, 10

King v. Port Auth. of New York and New Jersey, 909 F.Supp. 938, 946 (D.N.J. 1995)..... 8

Malverty v. Waterfront Comm'n of New York, 71 N.Y. 2d 977, 980, 524 N.E. 2d 421, 422 529 N.Y.S.2d 67, 68 (1988) 6, 7, 8

Nardi v. Delaware River Port Auth., 88 Pa. Commw. 558, 560, 490 A. 2d 949, 950 (1985) 6, 9

Polk Cty. v. Martin, 292 Or. 69, 82 636 P.2d 952, 960 (1981) 6

Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, 314 (1990) 5

Settecase v. Port Auth. of New York and New Jersey, 13 F. Supp.2d 530, 535 (S.D.N.Y. 1998)..... 8

Texas v. New Mexico, 462 U.S. 554, 564 (1983) 3

United States v. Belkins, 304 U.S. 27 (1938) 5

Rules and Statutes:

N.J.S.A. 32:3-1 *et seq.*..... 1, 2, 9

36 Pa. Cons. Stat. §3503 *et seq.*..... 1, 2

53 Pa. Cons. Stat. §§637-38..... 9

United States Constitution, Art. I, §10, cl. 3 ..... *passim*

BRIEF OF THE DELAWARE RIVER PORT AUTHORITY OF PENNSYLVANIA AND NEW JERSEY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") files this *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by Petitioners, Chris Woodall ("Woodall") and the Columbia River Gorge Commission ("CRGC"), for review of the decision below from the Washington Court of Appeals ("Washington Court").[1] Both Petitioners have consented to the filing of this brief and their consents have been filed with the Clerk of this Court. However, since Respondent Skamania County has not consented to the DRPA's appearance at this stage, the DRPA has filed the preceding Motion for Leave to appear as an *amicus curiae*.

THE DRPA'S INTEREST AS *AMICUS CURIAE*

Similar in nature to Petitioner CRGC, the DRPA is a bi-state public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey, created with Congressional approval pursuant to the Compact Clause of Article I of the United States Constitution, art. I, § 10, cl. 3. *See* N.J.S.A. 32:3-1 *et seq.;* Pa. Stat. Ann. tit. 36, § 3503 *et seq.*

The DRPA currently operates four interstate bridges between Pennsylvania and New Jersey across the Delaware River — the Benjamin Franklin, the Walt Whitman, the Commodore Barry and the Betsy Ross. Through a wholly-owned subsidiary, the DRPA operates a high-speed transit line between Philadelphia, Pennsylvania, and Lindenwold, New Jersey. Through another division, the DRPA also

1. Counsel for DRPA authored this brief in whole and no monetary contribution was made by any other person for the preparation or submission of the brief.

provides promotional and strategic planning assistance to the region's maritime facilities and is responsible for regional export development through its network of international representatives. DRPA's revenue for all of its activities in 2000 was $240,763,000. *DRPA's Comprehensive Annual Financial Report for the Year Ended December 31, 2000,* at 60.

Under the DRPA's Compact, the DRPA is authorized to undertake only those activities and operations that have been approved by the legislatures of Pennsylvania and New Jersey. For a single state's law to apply to the DRPA, it must be *"concurred in by legislation of the other."* N.J.S.A. 32:3-5; Pa. Stat. Ann. tit. 36, § 3503 (Art. IV).

DRPA has a substantial interest in this case. By holding that Washington common law should control a dispute involving land within the CRGC's purview in the face of conflicting Oregon law, the Washington Court added to a growing conflict among federal and state courts concerning rules for determining whether and when a single state's law or policy may be imposed upon bi-state or multi-state entities. The Washington Court's decision, like recent decisions from the New Jersey state courts, deviated from the analytical framework formulated and applied by federal courts and a number of other state courts across the country examining the application of state law to a bi-state entity.

The DRPA submits that, where a standard has not been expressly specified in a bi-state compact entity's enabling legislation, a uniform federal standard must be utilized. The appropriate formulation of this standard is necessary to resolve the important federal question of when courts may impose state law obligations on bi-state entities created by federal law compacts. Absent a clear and workable standard, bi-state entities will continue to be subject to entirely different, and potentially conflicting, standards for imposing creator-state obligations, with all the attendant problems of forum-shopping, and with the outcome of disputes depen-

dant upon which of their creator states' courts is deciding the dispute.

The issue concerning application of a single state's law to a bi-state entity has recently surfaced with increasing frequency for the DRPA and other bi-state compact entities, yet this Court has not reviewed the issue. *See, e.g., Dezaio v. Port Auth. of New York and New Jersey,* 205 F.3d 62 (2d Cir.), *cert. denied,* 531 U.S. 818 (2000); *Fraternal Order of Police, Penn-Jersey Lodge 30 v. Delaware River Port Auth.,* 323 N.J.Super. 444, 733 A.2d 545 (App. Div. 1999), *certif. denied,* 162 N.J. 663, 745 A.2d 1213 (1999), *cert. denied,* 530 U.S. 1275 (2000); *Int'l Union of Op. Eng'rs, Local 68 v. Delaware River and Bay Auth.,* 143 N.J. 328, 670 A.2d 1068 (1996), *cert. denied,* 522 U.S. 861 (1997). Until the issue is settled by this Court, the body of law applicable to bi-state entities will continue to evolve in an unpredictable, unworkable, and problematic fashion. A clear, workable, and uniform federal standard is necessary.

ARGUMENT

I. The Issue Presented Potentially Affects Nearly 200 Bi-State Compact Entities Throughout The Nation And Is Important.

The Compact Clause of the United States Constitution expressly prohibits two states from entering into an agreement without first receiving the consent of the United States Congress. U.S. Const. Art. I, § 10, cl. 3. In interpreting the Compact Clause, this Court has held that once Congressional consent has been given, "unless the compact to which Congress has consented is somehow unconstitutional, *no court may order relief inconsistent with its express terms." Texas v. New Mexico,* 462 U.S. 554, 564 (1983) (citing *Cuyler v. Adams,* 449 U.S. 433, 438 (1981)) (emphasis added).

In addition to the CRGC and the DRPA, Congress has authorized approximately 194 bi-state or interstate com-

pacts. Council of State Governments, *Interstate Compacts & Agencies* (1998), *reprinted at http://ssl.scg.org/compactlaws/master98.pdf*. These compact entities carry out essential governmental objectives, including facilitation of substantial interstate trade and commerce. *Id.*

If review is not granted, future application of the Washington Court's decision could have the following effects on the DRPA and other similarly situated bi- and multi-state compact entities:

- Courts in states that have created bi- or multi-state compacts will be free to utilize different and conflicting legal standards for determining whether they may apply their state laws and/or policies to their bi-and multi-state compact entities;

- Plaintiffs will select the state laws and/or policies that are most favorable to them, regardless of bi-state concurrence, through forum-shopping;

- Through its court system, a single creator state will unilaterally apply its own substantive laws and policies on its bi-state entities, as occurred in this case;

- Creator state courts that unilaterally impose state law obligations on bi-state entities will violate the Compact Clause of the United States Constitution and federal law; and

- Ultimately, this Court, under its original jurisdiction, will be asked to rule on lawsuits filed between and among creator states seeking to enjoin the application of another creator state's laws and policies to jointly created bi-state entities.

This Court should grant review to establish a uniform and workable federal legal standard for application of state law to bi-state entities created under the Compact Clause.

II. This Court Should Grant Review To Establish An Appropriate Uniform Federal Legal Standard For Analyzing The Important Federal Question Of When, If Ever, A Single State's Laws May Be Imposed On A Bi-State Entity.

Like the CRGC, the DRPA is a product of three sovereigns — two states and the United States Congress. In creating the DRPA, Pennsylvania and New Jersey did what all states do when creating a compact entity — they surrendered a portion of their own sovereignty to the entity, including their powers to unilaterally impose and enforce their own state laws and policies on the entity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) ("An interstate compact, by its very nature, shifts a part of the state's authority to another state or states, or *to the agency* the several states jointly created to run the compact."); *United States v. Belkins*, 304 U.S. 27 (1938); *C.T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408, 409-10 (D. Md. 1976).

As this Court has acknowledged, "no one state can control the course of a Compact Clause entity" due to this grant of sovereignty. *Hess*, 513 U.S. at 47. Thus, a single state's law can only apply to a bi-state entity where there is "consent of all parties" to the compact. *C.T. Hellmuth*, 414 F. Supp. at 409; *see also Dezaio v. Port Auth. of New York and New Jersey, supra*, 205 F.3d at 65 ("bi-state entities created by compact . . . are not subject to the unilateral control of any one of the States that compose the federal system").

One line of authority holds that creator states may not unilaterally impose additional duties or obligations on their bi-state entities that contravene the terms of their compacts, absent an "express statement" of intent from both states' legislatures. *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring); *Delaware River Port Auth. v. Fraternal Order of Police, Penn-Jersey Lodge 30 ("FOP")*, 135 F. Supp.2d 596 (E.D. Pa. 2001), *appeal*

docketed, No. 01-1866 (3d Cir. Apr. 10, 2001) ("express statement" of applicability required); *C.T. Hellmuth, supra,* 414 F. Supp. at 409-10; *Malverty v. Waterfront Comm'n of New York,* 71 N.Y.2d 977, 980, 524 N.E.2d 421, 422, 529 N.Y.S.2d 67, 68 (1988) ("express statement" of intent required); *Delaware River Port Auth. v. Comm. of Pennsylvania,* 137 Pa. Commw. 170, 172-73, 585 A.2d 587, 588 (1991) ("joint legislation by the two creator states" required); *Nardi v. Delaware River Port Auth.,* 88 Pa. Commw. 558, 560, 490 A.2d 949, 950 (1985); *Delaware River & Bay Auth. v. Carello,* 43 Del. Ch. 213, 222 A.2d 794 (1966) ("concurrent legislative action" required).

In conflict with this well-established line of authority, the Washington Court relied solely on Washington common law to review a CRGC action despite directly conflicting Oregon law on the relevant point, namely, construction of the term "discontinued." *Compare Andrew v. King Co.,* 21 Wash. App. 566, 572, 586 P.2d 509, 513-14 (1978), *review denied,* 91 Wash.2d 1023 (1979) (term "discontinued" implicitly requires proof of intent to abandon), *with Polk Cty. v. Martin,* 292 Or. 69, 82, 636 P.2d 952, 960 (1981) (term "discontinued" contained in ORS 215.130 does *not* require any intent to abandon). There was no "express statement" of intent from Washington's legislature regarding the meaning of the term "discontinued," and the case was not analyzed in that fashion.

By failing to apply the "express statement" of intent standard for determining whether and when state law applies to a bi-state compact entity, the Washington Court added to the growing conflict among courts regarding the proper legal standard for application of state law to bi-state compact entities.

A. All Federal Courts And Some State Courts Have A Standard Requiring An "Express Statement" Of Intent And Legislative "Concurrence" Before Imposing One Creator State's Law On Bi-State Entities.

Presently, all federal courts and a majority of state courts engage in a two-part analysis before imposing a state law on a bi-state entity: First, does the state law "expressly" apply to the bi-state entity, or has it generally been made applicable to bi- or multi-state entities? If so, have each of the creator states enacted "concurrent" legislation to further suggest the applicability of state law?

There are numerous examples of courts that have refused to impose a state law on a bi-state entity where that law was not made expressly applicable to the bi-state entity — thus failing the first prong of the test.

By invoking a Maryland statute affording access to public records, the plaintiff in *C.T. Hellmuth v. Washington Metropolitan Area Transit Authority* attempted to obtain records from a multi-state agency created by compact among Maryland, Virginia and the District of Columbia. The District Court refused to impose the Maryland statute because it was not expressly applicable to multi-state entities. That each of the states to the compact had enacted "equivalent legislation" was irrelevant, because the court never moved past the first prong of the test. 414 F. Supp. at 409 ("the mere fact that Virginia and the District have adopted freedom of information laws can hardly be taken as a tacit agreement on their part that WMATA should be governed by the Maryland law. . . .").

Similarly, in *Malverty v. Waterfront Commission of New York*, a convicted felon challenged a determination by the bi-state Waterfront Commission of New York Harbor ("Waterfront Commission"), denying his application to be restored to the longshoremen's register as violative of New York's Correction Law. The Court of Appeals ruled that New

York's Correction Law did not apply to the Waterfront Commission, notwithstanding a statute in New Jersey that "evinced the same, or similar, public policy regarding employment opportunities for former inmates . . . ." 71 N.Y.2d at 980, 524 N.E.2d at 422, 529 N.Y.S.2d at 68. Similar public policies were, in the court's view, simply not sufficient "to render [the compact] properly amended or supplemented such that the Commission would be subject to the provisions of the New York [law]." *Id.*

Applying the *Malverty* court's analysis, the Second Circuit Court of Appeals and federal District Courts in New York and New Jersey have refused, on several occasions, to apply either state's anti-discrimination laws to their bi-state entities even though New York's Human Rights Law and New Jersey's Law Against Discrimination were enacted to promote similar policies. *Dezaio v. Port Auth. of New York and New Jersey, supra,* 205 F.3d at 65 ("Nothing has been cited suggesting that New York's or New Jersey's anti-discrimination laws were *intended* to affect the internal operations of the Port Authority"); *accord Settecase v. Port Auth. of New York and New Jersey,* 13 F. Supp.2d 530, 535 (S.D.N.Y. 1998) ("If New York and New Jersey intend their own anti-discrimination laws to apply to the Port Authority, they have the means to do so clearly and *expressly*, as they have done for other laws.") (emphasis added); *Baron v. Port Auth. of New York and New Jersey,* 968 F. Supp. 924, 929 (S.D.N.Y. 1997) ("the statute must *expressly* state that the 'legislation [is] amending a certain portion of the 'Compact' and the new law would take effect upon the enactment into law by New Jersey of legislation having an effect identical to New York's legislation'") *(quoting Malverty); King v. Port Auth. of New York and New Jersey,* 909 F. Supp. 938, 946 (D.N.J. 1995) ("the single law of one state may not be applied to a bi-state entity unless the law of all relevant states are *identical* or the states *explicitly articulate* that the law should apply") (emphasis added), *aff'd,* 106 F.3d 385 (3d Cir. 1996).

Securing an affirmative answer to the first question does not ensure that the state law will apply.

In *Nardi v. Delaware River Port Authority,* the Pennsylvania Commonwealth Court evaluated whether the Pennsylvania Enforcement Officers Disability Benefits Law ("Pennsylvania Benefits Law"), 53 Pa. Cons. Stat. §§ 637-38, which was designed for the specific purpose of providing disability benefits to the DRPA's police officers, nevertheless required the DRPA to pay supplementary disability benefits to a disabled DRPA police officer. 88 Pa. Commw. at 560, 490 A.2d at 950. New Jersey had enacted a counterpart to the Pennsylvania Benefits Law, N.J.S.A. 32:3A-1, and *both* laws were "expressly" applicable to the DRPA.

Despite the express applicability of the statutes, Pennsylvania's Commonwealth Court refused to award the officer benefits under the statute, because the Pennsylvania Benefits Law required that the DRPA *"shall"* provide disability benefits to its police officers, while the New Jersey Law merely provided that the DRPA *"may"* provide such benefits at its discretion. *Id.* at 562, 490 A.2d at 951. The court viewed the Pennsylvania law as "a unilateral legislative act *imposing* an additional burden on the Authority," compelling payment of benefits that had never been mentioned in the DRPA's enabling Compact, whereas the New Jersey law "was a unilateral legislative act *restricting* a power already possessed by the Authority." *Id.* at 565, 490 A.2d at 952 (emphasis added).

From this dispositive distinction, the Commonwealth Court ruled that "[t]he Pennsylvania legislature has demonstrated that it does not concur" with New Jersey's legislature. *Id.* In so holding, Pennsylvania followed the more exacting, and generally accepted, standard that must be satisfied before one compact state may permissibly impose its laws on a bi-state entity such as the DRPA. Therefore, even where express statements in both states' statutes seem to make the statutes applicable to the DRPA,

a *minor difference in language* often proves significant in determining whether concurrence exists.

B. Washington And New Jersey State Courts Have Implemented A Different Test For Analyzing The Imposition Of State Law On Bi-State Entities.

By contrast, New Jersey state courts have recently developed a "complementary and parallel" legislation test from which courts could *imply* legislative consent to the application of a single state's statutes to a bi-state entity. Using this test, courts must (1) conduct a "painstaking" analysis of the allegedly "complementary and parallel" statutes, to establish that they are virtually identical in their terms, and (2) demonstrate evidence of "some intent" that the statutes apply to a bi-state entity. *Eastern Paralyzed Veterans Assn. v. City of Camden,* 111 N.J. 389, 545 A.2d 127 (1989); *Bell v. Bell,* 83 N.J. 417, 310 A.2d 829 (1980). While not demanding the same level of creator state concurrence, courts applying this standard have refused to impose, *inter alia*, New Jersey's anti-discrimination or whistleblowing laws, on bi-state entities. *Id.* (refusing to impose New Jersey's Law Against Discrimination on DRPA); *Ballinger v. Delaware River Port Auth.,* 311 N.J. Super. 317, 709 A.2d 1336 (App. Div. 1998) (refusing to impose New Jersey's Conscientious Employee Protection Act on DRPA), *cross-petition for certif. docketed,* Case No. 51,504 (N.J. 2001).

However, New Jersey state courts have been more permissive and now permit any creator state to impose its *public policies* on a bi-state entity through a mere showing that similar policies exist in both creator states. *Int'l Union of Operating Eng'rs Local 68 v. Delaware River and Bay Auth., supra,* 147 N.J. at 443-45, 688 A.2d at 574-75. This "similar public policy" imposes state law in the absence of legislative authority or legislative consent from either creator state. *See, e.g., Bunk v. Port Authority of New York and New Jersey,* 144 N.J. 176, 676 A.2d 118 (1996);

Fraternal Order of Police Penn-Jersey Lodge 30 v. Delaware River Port Auth., supra, 323 N.J. Super. at 459-60, 733 A.2d at 554. These decisions provide an obvious and important incentive for forum-shopping by plaintiffs trying to benefit from a single state's law in suits against bi-state entities, behavior that ultimately threatens the viability of their compacts.

With the exception of the New Jersey state courts, and now the Washington Court, no other courts have dispensed with the "express statement" of intent test. As the Eastern District of Pennsylvania recently stated in a case involving the DRPA: *"no federal court . . . has adopted New Jersey's more permissive view, and this Court has not been persuaded to become the first." Pilla v. DRPA,* 1999 WL 345918, at *4 (E.D. Pa. May 7, 1999) (emphasis supplied).

The conflicting standards now in use to determine application of state law to a bi-state entity are frequently outcome-determinative. A bi-state entity may be held bound by one of its creator state's law or public policies, but not the other's. Review in this case would establish a uniform, workable legal standard concerning what state law applies to bi-state entities so that bi-state entities may conform their conduct to applicable law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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